

ORIGINAL

Before the  
Federal Communications Commission  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )  
 )  
Amendment of Section 73.202(b) ) MM Docket No. 98-158  
Table of Allotments, ) RM-9342  
FM Broadcast Stations, )  
(Grants and Peralta, New Mexico) )

To: Chief, Allocations Branch

**COMMENTS OF REGENTS OF THE UNIVERSITY OF NEW MEXICO**

Regents of the University of New Mexico ("UNM"), licensee of noncommercial educational radio Station KUNM(FM), Albuquerque, New Mexico, by its attorneys, hereby submits these comments in response to the Commission's *Notice of Proposed Rule Making* ("NPRM") in the above-captioned proceeding. UNM questions whether the petition by Educational Media Foundation ("EMF"), permittee of unbuilt Station KQLV(FM), Channel 288C, Grants, New Mexico, will serve the public interest. EMF proposes to substitute Channel 244C3 for Channel 288C at Grants, to reallocate Channel 288C1 to Peralta, New Mexico, and to modify its license accordingly. UNM believes the public interest could be better served if EMF were to proceed towards construction of KQLV(FM) at its authorized site serving Grants, New Mexico.

**Introduction**

Channel 288C was originally allotted to Grants, New Mexico in 1987. Part of the rationale for the allotment was the provision of a wide area FM coverage service to the "widely scattered rural population, including several American Indian reservations, in the

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Grants area." *Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations (Grants, New Mexico)*, 2 FCC Rcd 5240 (1987). Still, over a decade later, that service has not been instituted.

Moreover, this is not the first time that an attempt has been made to remove Channel 288C from Grants, New Mexico. In 1992, before the current permittee of the new station on Channel 288C had been selected, an applicant for Channel 288C attempted to remove the channel from Grants and reallocate it to Belen, New Mexico -- a community a few miles south of Peralta, New Mexico. The Commission rejected that approach. *Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (Belen and Grants, New Mexico)*, 7 FCC Rcd 4655 (1992). UNM has not been able to unearth the status of Channel 288C at Grants between 1992 and 1996. However, in 1996, EMF and six other applicants filed for the channel. In January, 1998, the applicants reached a universal settlement with the winning applicant determined by private auction in accordance with the settlement limitations waiver of Section 309(l) of the Communications Act of 1934. The settlement documents reflect that "speeding the institution of new radio broadcast service" to Grants was part of the public interest rationale for the settlement. We respectfully request that the Commission incorporate, by reference, the prior allotment and application history of Ch. 288C at Grants, New Mexico into this proceeding.

#### **I. Peralta Does Not Deserve a First Local Service Preference**

The Commission resolves proposals to change a station's community of license based upon a comparison of the proposed allotment plan and the existing allotments for the communities involved. Only if the proposal would result in a preferential arrangement of

allotments would the proposal be granted. Further, to determine whether a proposal would result in a preferential arrangement of allotments, the Commission is guided by the FM allotment priorities.<sup>1/</sup> Grants has four radio stations licensed to it, whereas an allotment to Peralta could trigger the third allotment priority -- first local service.

However, in *Change of Community MO&O*, the Commission observed that the "inflexible application [of the first local service] preference, without further analysis, could consistently result in our finding that a reallocation leading to first local service for a suburb of a much larger adjacent metropolitan center justifies removing a local service from a more remote community."<sup>2/</sup> Consequently, and as required by Section 307(b) of the Communications Act, the FCC has "consistently given little or no weight to claimed first local service preferences if, given the facts and circumstances, the grant of a preference would appear to allow an artificial or purely technical manipulation of the Commission's 307(b) related policies."<sup>3/</sup>

In this case, EMF has requested authority to relocate Station KQLV from the larger, more rural, community of Grants, New Mexico (population 8,626) to the smaller, more urbanized, community of Peralta, New Mexico (population 3,182), which is adjacent to Albuquerque, a commercial metropolitan area served by a multitude of AM, FM and Television stations.

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<sup>1/</sup> *Id.* The FM priorities are: (1) First full-time aural service; (2) Second full-time aural service; (3) First local service; and (4) Other public interest matters. Co-equal weight is given to priorities (2) and (3). *Revision of FM Assignment Policies and Procedures ("FM Priorities")*, 90 FCC 2d 88 (1982).

<sup>2/</sup> *Change of Community MO&O*, 5 FCC Rcd at 7096.

<sup>3/</sup> *Id.* See also *New South Broadcasting Corporation v. FCC*, 879 F.2d 867, 870 (DC Cir. 1989) (observing that one "danger" of "granting a preference to the applicant who proposes to serve [a] community without an existing radio station . . . is that broadcasters will exploit the Commission's rules by specifying a small unserved community as the city of license, while in reality serving a much larger adjacent community") (citation omitted).

Furthermore, while Grants is approximately 79 miles from the City of Albuquerque. Peralta is approximately 18 air miles from downtown Albuquerque.<sup>4/</sup> Because Peralta is located close to Albuquerque's downtown area, many commuters pass through this community each day on their way to work, shopping and entertainment in the downtown area. As a result, listeners and advertisers would likely be hard pressed to identify any distinction between a radio station licensed to serve Peralta and those stations licensed to serve Albuquerque.

As the Commission recognized in the *NPRM*, neither Grants or Peralta are located within an Urbanized Area. However, if a station seeks to change its community of license to one which is outside an urbanized area but whose signal would place a city-grade, 70 dBu, signal over 50% or more of an Urbanized Area, the proponent is required to provide the same showing as currently required for those parties seeking to move a community within an Urbanized Area. Accordingly, in order to determine whether a proposal to serve a suburban community located within, or adjacent to, an Urbanized Area, such as Peralta, should receive a first local service preference, the Commission is guided by the following three factors: (1) signal population coverage, that is, the degree to which the proposed station is capable of providing service to both the suburban community and the larger metropolis; (2) the size and proximity of the suburban community relative to the metropolis; and (3) the interdependence of the suburban community with the metropolis, as gauged by eight factors.<sup>5/</sup>

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<sup>4/</sup> *Rand McNally Road Atlas, Map of New Mexico, Mileage Between Principle Cities*, page 64.

<sup>5/</sup> *See Headland, Alabama and Chattahoochee, Florida*, 10 FCC Rcd 10352 n.8 (1995). There are eight factors relevant to interdependence that the Commission considers: (1) the extent to which community residents work in the larger metropolitan area, rather than the specified community; (2) whether the smaller community has its own newspaper or other media

With respect to the first factor, the NPRM states that the proposed Peralta allotment would enable Station KQLV to provide 86% of the Albuquerque Urbanized Area with a 70 dBu signal. This figure standing alone is highly indicative of the fact that the Peralta proposal is nothing more than an attempt by EMF to operate an Albuquerque station.

Moreover, with respect to the second factor, the proximity of Peralta to Albuquerque and a comparison of population figures confirm that the former is indistinguishable from the latter. Peralta is located approximately 18 air miles from Albuquerque. Moreover, Peralta's 1990 population of 3,182 represents approximately eight percent (8%) of the size of Albuquerque, which recorded 384,736 persons in the 1990 census. Peralta, therefore, is not unlike the communities of Richmond, California, and Sandy Springs, Georgia, for which the Commission denied a first local service preference based in part on their close proximity and much smaller sizes relative to their larger neighbor.<sup>6/</sup>

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that covers the community's local needs and interest; (3) whether the community leaders and residents perceive the specified community as being an integral part of, or separate from, the larger metropolitan area; (4) whether the specified community has its own local government and elected officials; (5) whether the smaller community has its own telephone book provided by the local telephone company or zip code; (6) whether the community has its own commercial establishment, health facilities, and transportation systems; (7) the extent to which the specified community and the central city are part of the same advertising market; and (8) the extent to which the specified community relies on the larger metropolitan area for various municipal services.

<sup>6/</sup> *RKO General Inc. (KFRC)*, 5 FCC 3222 at ¶ 12 (1990) (stating that the "size and proximity also favor applying *Huntington*. Richmond is one-ninth the size of San Francisco and only 16 miles away."); *Eatonton*, 6 FCC Rcd 6580 at ¶¶ 24, 25 (1991) (stating that "the [applicant] has an extremely weak case . . . for the award of a first local service preference . . . . Sandy Springs is directly adjacent to Atlanta. Under the most favorable assumptions, Sandy Springs is approximately one sixth the size of Atlanta in population.").

With respect to the third fact and most importantly, the suburban community of Peralta is interdependent with the Albuquerque Urbanized Area. Guidance in this area comes from *RKO General (KFRC)*, in which the Commission first applied the interdependence factors enunciated in *Faye and Richard Tuck*, 3 FCC Rcd 5374 (1988) to a case involving FM allotments. In *KFRC*, applicants in a comparative renewal proceeding proposed the community of Richmond, California, in their mutually exclusive application. Richmond, located 26.7 kilometers (16 miles) outside of San Francisco, but within the San Francisco - Oakland Urbanized Area,<sup>2/</sup> boasted a local government that provided a "full complement of municipal services," an elected council-city manager form of government, and an annual budget of over \$117 million. The FCC took notice of the fact that Richmond had a full complement of commercial establishments. Nonetheless, one-third of the Richmond work force traveled to San Francisco, while only one-third worked within Richmond. Moreover, Richmond lacked its own public transportation services, newspaper, public hospital, and telephone directory. Finally, the FCC noted that Richmond was served by the twenty-five radio stations licensed to San Francisco as well as others licensed to other nearby communities and was included in the San Francisco radio market. Despite the existence of some persuasive factors of independence (noting especially the presence of a local government and range of municipal services), the Commission concluded that

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<sup>2/</sup> For comparison, the community of Reston, Virginia, is located about the same distance from Washington D.C. See *Elijah Broadcasting Corp.*, 68 RR 2d 205, 208-209 (1990) (noting that a proposed Reston allotment raised similar concerns about independence as those discussed in *KFRC*; case remanded to determine if proposed facility, through a facilities change, would be able to cover more than "a small corner of Washington, D.C.").

Richmond was too interdependent with the urbanized area to warrant a first local service preference.<sup>8/</sup>

The Peralta proposal presents an even less compelling case than that before the Commission in *KFRC*. Peralta does not have "a full complement of municipal services," as documented in the attached Declaration. Peralta does not have its own school system. The one school in Peralta is part of the Los Lunas School District, the county seat of Valencia County. In addition, Peralta does not have a hospital within its borders, so its residents travel to Albuquerque or other communities to seek medical attention in case of an emergency. Moreover, Peralta does not have its own local government or elected officials. The community is governed as part of Valencia County.

A further analysis of additional *Tuck/KFRC* criteria confirm that Peralta and the Albuquerque Urbanized Area are interdependent. Over half of Valencia County's workforce travels outside the county for employment.<sup>9/</sup> In fact, the county's economy depends upon residents who commute to jobs in Albuquerque.<sup>10/</sup> Furthermore, among the business establishments located in Peralta, only a few apparently use "Peralta" in their names. In addition, Peralta does not have its own newspaper. The only "local" paper of sorts is the Valencia County News Bulletin, which is published twice a week. While many of the communities surrounding Albuquerque have separate sections in the Albuquerque phone book,

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<sup>8/</sup> *KFRC*, 5 FCC Rcd at ¶ 20.

<sup>9/</sup> See U.S. Census Home Page. The information may be found at: <http://venus.census.gov/cdrom/lookup/909171716>.

<sup>10/</sup> See Los Lunas Schools Home Page. The information may be found at: <http://llmain.loslunas.k12.nm.us>

Peralta does not. The community also does not have any radio or television stations licensed to it. Instead, Peralta is served by Albuquerque's twenty-eight radio stations and eight television stations.<sup>11/</sup> Moreover, the town also does not have its own public transportation system. Instead, like Richmond and Sandy Springs, the town relies on regional bus and rail lines.

In summary, although Peralta exhibits some characteristics that arguably support a claim of independence, the complete record indicates that the town is closely interdependent with the Albuquerque Urbanized Area. As noted, it has no local government, no local school system, no local hospital, and no local newspaper. Furthermore, given the expansive coverage of the proposed KQLV signal over the urbanized area and Peralta's size and proximity to Albuquerque, Peralta does not warrant a preference for first local service under the Commission's precedents. Consequently, the Commission must attribute all of the services of the Albuquerque Urbanized Area to the town of Peralta and consider this proposal pursuant to the fourth FM allotment priority, "other public interest matters."

## **II. The Fourth Allotment Priority Does Not Support This Proposal**

The fourth allotment priority is other public interest matters. As shown herein, UNM is concerned that the public interest would not be served by EMF's proposal. First, UNM is concerned about the delay in institution of radio service to Grants, New Mexico. The channel was allotted over a decade ago, but no service has been instituted. EMF has indicated that it is willing to pursue construction at its authorized site and work with the Forest Service on redesignating the site for high power usage. But, if Channel 288C were removed from Grants and Channel 244C3 substituted for it, the entire application process for a new radio station at

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<sup>11/</sup> *Broadcasting & Cable Yearbook*, vol.1, 1998.



Grants must commence yet again (presumably after implementation and application of the new broadcast auction procedures.) Moreover, any permittee for Channel 244C3 might also use a site on Forest Service land and find it necessary for the Forest Service to redesignate the authorized site for high power usage, which would still require at least two more years, based on EMF's estimate. Thus, new radio service to Grants could be further delayed, without a valid countervailing benefit.

Second, UNM is concerned about the impact on noncommercial educational radio service in the Albuquerque area, given that EMF styles Station KQLV as a "noncommercial" station and that EMF is simultaneously prosecuting an application for a new full service noncommercial educational FM station on Channel 213 for the same community -- Peralta, New Mexico (FCC File No. BPED-961024MD).<sup>12/</sup> Other noncommercial educational applicants, including UNM, are involved in a mutually exclusive situation with EMF's Peralta Ch. 213 application.<sup>13/</sup> EMF and other applicants propose new noncommercial educational FM stations in the respective communities of Peralta, Grants and Belen, New Mexico. UNM believes that the pending noncommercial mutually exclusive situation involving EMF's Channel 213 application for Peralta -- and the aural and local service issues that are part of that situation -- impact on EMF's proposed reallocation proceeding for KQLV(FM).

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<sup>12/</sup> Moreover, EMF is also prosecuting two noncommercial educational FM translator station applications with identical technical parameters that would serve the Albuquerque area -- a translator application for "Sandia" on 89.5 MHz (FCC File No. BPFT-970902TJ) and a second application for "Placitas" on 91.9 MHz (FCC File No. BPFT-970902TH).

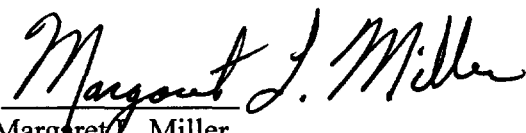
<sup>13/</sup> UNM has filed an application to upgrade its Station KUNM(FM), which application is mutually exclusive with the EMF's Ch. 213 Peralta application and the other applications mentioned.

The Commission must not apply inflexibly its allotment priorities in this case -- it should determine whether the public interest is best served by keeping Channel 288C at Grants and requiring EMF to construct KQLV(FM) at its authorized site (which EMF has indicated that it is willing to pursue), or by removing a self-styled "noncommercial" unbuilt station on Channel 288C from Grants in favor of the well-served Albuquerque radio market, and substituting a nonequivalent, less powerful Class C3 channel in Grants. The Commission should also take into account the effect of the pending mutually exclusive proceeding involving EMF in making its decision in this allotment proceeding.

For these reasons, UNM believes the public interest may not be served by adoption of EMF's proposal.

Respectfully Submitted,

REGENTS OF THE UNIVERSITY OF NEW  
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November 2, 1998

## **DECLARATION**

## DECLARATION

I, Tracy A. Locklin, am an associate attorney at the law firm of Dow, Lohnes & Albertson and admitted to the practice of law in the State of Virginia. The factual representations made in the foregoing "Comments of Regents of the University of New Mexico" concerning Peralta's lack of a local hospital, local school system, local government, or local public transportation system, and the information on business establishments using the word "Peralta" in their name, are based on my research. I personally called the Los Lunas Chamber of Commerce and the Valencia County Manager's Office, and conducted Internet searches using Yahoo's Yellow Pages website, in order to establish and confirm the accuracy of these representations. These factual statements are true and correct to the best of my knowledge and belief.

I make this declaration under penalty of perjury.

Tracy A. Locklin  
Name

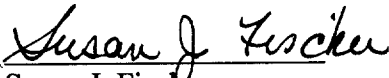
10/30/98  
Date

CERTIFICATE OF SERVICE

I, Susan J. Fisher, a secretary at Dow, Lohnes & Albertson, hereby certify that a copy of the foregoing Comments of Regents of the University of New Mexico was served by U.S. Mail, postage prepaid, or by hand delivery, this 2nd day of November 1998 to the following:

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